IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TONY B. HUNT	)	
Petitioner,	)	
	)	
v.	)	Case No. 04-3042-WEB
	)	
	)	
RAY ROBERTS	)	
El Dorado Correction Facility,	)	
	)	
Respondents.	)	

MEMORANDUM AND ORDER

Pursuant to 28 U.S.C. § 2254, petitioner Tony Hunt seeks review of his convictions in Kansas state court. Petitioner was convicted of second degree murder and attempted first degree murder. "The exhaustion requirement is satisfied if the federal issue has been properly presented to the highest state court, either by direct review of the conviction or in a postconviction attack." *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir. 1994). The petition before this Court contains exhausted and unexhausted claims. Federal courts may dismiss mixed petitions to allow petitioner to pursue state court remedies or they can reach the merits and deny. *See* § 2254(b)(2); *Brown v. Shanks,* 185 F.3d 1122, 1125 (10th Cir. 1999); *Rose v. Lundy*, 455 U.S. 509, 510 (1982). However, "the Supreme Court noted that if a petitioner fails to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred,' petitioner's claims are procedurally defaulted for purposes of federal habeas." *Donaghey v. Bruce* 173 F. Supp.2d 1147, 1152 (D. Kan. 2001) quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

STANDARD OF REVIEW

The Court's standard of review is set out in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which "circumscribes a federal habeas court's review of a state-court decision." *Lockyer v. Andrade*, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144, 154 (2003). Where a state court has adjudicated a claim on the merits, the Court may not grant a writ of habeas corpus unless the adjudication:

> (1) resulted in a decision that was contrary to, or involves an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under § 2254(d)(1), "the only question that matters," is "whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law." *Lockyer*, 155 L.Ed.2d at 155. In other words, if § 2254(d)(1) applies the Court need not conduct a de novo review of the state court decision. *Id.*

Clearly established Federal law means, "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Id.* Determining what the Supreme Court has clearly established is usually "straightforward." *Id.* First, a state court's decision is *contrary* to such law "if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed.2d 914, 926 (2002). Second, the state court's *application* of clearly established Federal law is *unreasonable* "if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case." *Id.* The

application must be unreasonable, not just incorrect. *Id.*

Section 2254(e)(1) requires this Court to presume the state court's factual determinations are correct; furthermore, the prisoner bears the burden to rebut the presumption by clear and convincing evidence. § 2254(e)(1).

APPLICATION

A. No Violation of Brady Rights

Petitioner claims that Kansas denied him his right to Due Process under the 14th Amendment as stated by *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. Petitioner argues that the state failed to disclose two convictions which showed the victim's past dealings in drugs and violent behavior. According to petitioner, this added evidence would have justified an instruction of voluntary manslaughter.

The Kansas Court of Appeals (KCA) correctly identified *Brady* and related state case law as the governing standard. The KCA stated "[t]o justify a reversal of Hunt's conviction for the prosecution's failure to disclose evidence, the evidence withheld must be clearly exculpatory and its withholding must be clearly prejudicial to the defendant." *Hunt v. Kansas*, No. 88,732 (Oct. 10, 2003) (Unpublished); *State v. Scott*, 271 Kan. 103, 118 (2001). Petitioner states in his Traverse that the KCA has never cited later U.S. Supreme Court cases on Brady violations such as *Kyles* and *Strickler*; however, the Supreme Court has stated that a state court holding "does not require citation of our [Supreme Court] cases - indeed it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradict them." *Early v. Packer*, 537 U.S. 3, 8 (2003), quoting *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000). The standard used by the KCA closely mirrors the standard set out by the

U.S. Supreme Court; therefore, it is not contrary to Federal law as suggested by petitioner. *See Strickler v. Greene*, 527 U.S. 263, 281-282 (1999).

The KCA ruled on the merits and found that petitioner suffered no prejudice as a result of the non-disclosure of the two convictions. This Court can disturb a Kansas ruling on the merits only if it was an unreasonable application of clearly established Federal law as determined by the U.S. Supreme Court. See § 2254(d)(1).

"There are three components to a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler*, 527 U.S. at 281-282. This Court will evaluate petitioner's claim against these factors to determine if the KCA holding was a reasonable application of federal law.

First, the petitioner must show that the suppressed evidence was favorable and evidence is favorable if it is exculpatory. *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995). Petitioner cites two convictions, one in California for an assault and a Kansas conviction for possession of marijuana. The assault conviction is not exculpatory as voluntary manslaughter requires a subjective inquiry of "an honest but unreasonable belief that circumstances existed that justified deadly force under K.S.A. 21-3211..." K.S.A 21-3403. Petitioner did not know that the victim's conviction was for assault; therefore, it is irrelevant to his subjective state of mind on the night of the murder.

Petitioner contends that the victim's misdemeanor conviction for possession of marijuana was exculpatory because it lent credence to his assertions at trial that the defendant was a drug dealer. "Evidence is exculpatory when it is inconsistent with the prosecution's case or tends to support the

defendant's case." *Gettings v. McKune*, 88 F. Supp. 2d 1205, 1213 (D. Kan. 2000). Petitioner's claim is flawed. First, a misdemeanor conviction of marijuana two years prior to the victim's murder does not show that he was a drug dealer as petitioner suggests. Furthermore, even if this connection could be made, the evidence would be cumulative. Petitioner and three other witnesses stated they knew the victim was involved with or had seen the victim with marijuana. (Tr. at 231, 427, 462, and 495). Petitioner fails to show that either conviction is favorable or exculpatory.

Second, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Banks v. Dretke*, 124 S. Ct. 1256, 1272 (2004) quoting *Brady*, 373 U.S. at 87. Petitioner did specifically request information about the criminal history of the victim. Motion for Disclosure. Petitioner states he was not provided with these two prior convictions; however, he also states he is unsure if he was provided the information and his counsel failed to use it. The record does not reveal if this information was disclosed or not; however, this Court will assume *arguendo* that the prosecution did not disclose these convictions.

Finally, petitioner must show he suffered prejudice. To be prejudicial, the evidence must be material. *Strickler*, 527 U.S. at 296. Evidence is material if "there is a reasonable probability, that had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 280 quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985). However, the inquiry is not strictly a result oriented test as the Court stated, "the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather the question is whether 'the favorable evidence could

reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler* 527 U.S. at 290 quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

This added evidence does not place the trial in a new light but is merely cumulative as the trial court heard extensive testimony from petitioner and others regarding the victim's drug involvement and threats directed at petitioner. The Kansas Supreme Court (KSC) reviewed the extensive testimony by petitioner and others regarding his fear of the victim and found that this did not warrant a voluntary manslaughter instruction. *State v. Hunt*, 270 Kan. 203 (2000). Even if this added evidence justified giving the jury a voluntary manslaughter instruction, there is still overwhelming evidence to support the second degree murder conviction. Given that this evidence does not put any new light on the trial as required by *Strickler* or put the veracity of the verdict in doubt, the suppression of these convictions was not prejudicial.

This Court holds that the KCA finding that there was no constitutional violation under *Brady* is not an unreasonable application of Federal law as determined by the U.S. Supreme Court.

B. Effective Assistance of Counsel Not Violated

This Court must determine if the KCA's holding denying petitioner's ineffective assistance of counsel claim was an unreasonable application of Federal law as determined by the U.S. Supreme Court. See § 2254(d)(1). "[W]e must first determine what constitutes 'clearly established federal law, as determined by the Supreme Court of the United States.'" *Lockyer,* 538 U.S. at 70. "[T]he *Strickland* test provides sufficient guidance for virtually all ineffective assistance of counsel claims..." *Williams v. Taylor,* 529 U.S. 362, 391 (2000), *See also Strickland v. Washington,* 466 U.S. 668 (1984). Because the state court correctly identified *Strickland* as the governing legal rule, the Court inquires whether the

state court applied that test in an objectively reasonable manner. *Spears v. Mullin*, 343 F.3d 1215, 1248 (10th Cir.2003); *See also Bell*, 535 U.S. at 694.

B(1). Failure to use or investigate victim's prior convictions

Petitioner claims his 6th Amendment right to effective counsel was violated because counsel either failed to present evidence of victim's prior assault and drug convictions or he failed to investigate these convictions. The KCA disagreed stating "The evidence was not exculpatory...But if the evidence was admissible, it is unlikely it would have resulted in a different verdict due to the overwhelming evidence against Hunt." *Hunt v. State*, No. 88,732 (Kan. Ct. App., October 10, 2003) (Unpublished Opinion). The KCA used state case law to determine ineffective assistance of counsel; however, the Kansas case emulates the standard set out by the Supreme Court in *Strickland. See State v. Hedges*, 269 Kan. 895, 913 (2000).

The KCA's opinion was an objectively reasonable application of *Strickland*. To establish a claim of ineffective assistance of counsel, petitioner must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his case (ie. but for his counsel's errors, the proceeding would have been different.) *Strickland*, 466 U.S. at 687-688.

First, petitioner is unsure if the prosecution failed to disclose the victim's convictions or if his counsel failed to present them to the court. The result is the same either situation.

Applying the first prong in *Strickland*, the KCA found that counsel was not deficient because there were good reasons for not presenting these convictions at trial. The KCA stated that the jury might discredit the petitioner if the defendant attacked the character of the murder victim. "When counsel focuses

on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 124 S. Ct. 1, 5 (2003). Petitioner has failed to rebut this strong presumption, especially in light of counsel's effective examination of petitioner and other witnesses regarding the victim's drug involvement and the petitioner's fearful behavior. Even if this Court assumes that counsel was deficient, petitioner's claim fails the second prong of *Strickland*.

As discussed earlier, these two convictions are neither exculpatory nor material. The two convictions were cumulative evidence in light of the testimony about the victim's involvement with drugs and petitioner's trepidation for his and his family's safety. The assault conviction was also irrelevant because it does not support petitioner's argument that the circumstances warranted a voluntary manslaughter instruction. It is irrelevant because while petitioner knew the victim had been in jail, he did not know it was for a violent crime; therefore, it could not have contributed on the night of the murder to any "honest but unreasonable belief that circumstances existed that justified deadly force under K.S.A. 21-3211..." K.S.A 21-3403. Even if counsel had investigated these convictions and presented them at trial, the outcome of the trial would not have been different; therefore, petitioner suffered no prejudice.

B(2). Counsel's failure to request attempted voluntary manslaughter instruction & failure to appeal

Petitioner argues that his counsel was unconstitutionally ineffective for failing to request an attempted voluntary manslaughter instruction and for also failing to raise this on appeal. On collateral review the KCA applied *Strickland* and denied petitioner's claim, stating that petitioner suffered no prejudice.

The KCA holding was not an unreasonable application of *Strickland*. Petitioner argues an

attempted involuntary manslaughter instruction is warranted because he needed to kill Gardenhire to prevent his family or himself from being killed. The facts do not support petitioner's fear as Gardenhire was asleep in another room with the door closed when petitioner entered the room and shot her. Counsel cannot be said to be deficient for failing to raise this issue to the trial court. *See Cargle v Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003) ("[I]f the issue is meritless, its omission will not constitute deficient performance").

Neither did petitioner suffer any prejudice as a result of his counsel's actions because there is not a reasonable probability that but for counsel's alleged error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 698. On direct review, the KSC denied petitioner's request for a voluntary manslaughter instruction on a set of more favorable facts; therefore, they would not have granted a request for an involuntary manslaughter instruction. As stated by the KCA, "Hunt had even less reason to shoot Gardenhire." *Hunt v. State*, No. 88,732 (Kan. Ct. App., October 10, 2003) (Unpublished Opinion). Therefore, even if counsel was deficient for failing to raise this issue at trial, petitioner was not prejudiced as it would not have affected the outcome.

Appellate counsel was not ineffective either. "The proper standard for assessing a claim of ineffectiveness of appellate counsel is that set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *Smith v. Robbins*, 528 U.S. 259 (2000)" *Cargle*, 317 F.3d at 1202. As stated above, petitioner's argument in support of the attempted voluntary manslaughter instruction is without merit; therefore, it is not ineffective assistance to fail to raise it on appeal. *See Smith*, 528 U.S. at 288(Counsel need not and should not raise every nonfrivolous claim). Petitioner's claim flunks both prongs of Strickland as counsel was neither ineffective nor did petitioner suffer prejudice; therefore, the KCA's denial of petitioner's claim was

not an unreasonable application of *Strickland*.

B(3). Failure to appeal trial court's rejection of attempted second degree murder instruction.

Petitioner argues that his appellate counsel was ineffective for failing to appeal the trial court's refusal to issue an attempted second degree murder instruction. On collateral review, the KCA correctly applied the *Strickland* test and denied petitioner's claim.

To evaluate whether appellate counsel was ineffective for failing to raise this issue on appeal it is necessary to evaluate the merits. *Baker v. State*, 243 Kan. 1 (1988); *Cargle*, 317 F.3d at 1202. There is little to no evidence to support his claim that he lacked premeditation; therefore, counsel cannot be deficient for failing to raise this argument. *See Smith*, 528 U.S. at 288 (Counsel need not and should not raise every nonfrivolous claim); *See also Cargle* 317 F.3d at 1202 ("[I]f the issue is meritless, its omission will not constitute deficient performance"). Kansas jurisprudence is consistent with these cases. On collateral review the KCA stated, "Conscientious counsel should only raise issues on appeal which, in the exercise of reasonable professional judgment, have merit." *Hunt v. State*, No. 88,732 (Kan. Ct. App., October 10, 2003) (Unpublished Opinion) quoting *Baker v. State*, 243 Kan. 1 (1988).

The only evidence showing petitioner lacked premeditation is his own statements and even those are not favorable:

> A: I just fired a shot from the door, but the evidence doesn't show that I know...
> Transcript at 528-529.
> Q: Did you fire from the doorway?
> A: I thought that I did.
> Q: You've heard her testify that you walked over to her said, Jannette, what happened,

you pushed her down on the bed, you pull up the gun, you put it to her head and you fired.
A: If she says that I believe her, ma'am.
Transcript at 590.
Q: You made a decision then after you shot Lamar Williams that you were going to go into the bedroom and eliminate any threat against you by shooting Jannette Gardenhire?
A: Yes, ma'am
(Tr. at 595).

Because the claim is meritless, counsel cannot be deficient for failing to raise it on appeal. After finding no deficient performance by counsel, the KCA also found that petitioner's claim flunked the second prong of *Strickland*. "It is unlikely the result of the appeal would have been different had Hunt's appellate counsel raised the trial court's failure to instruct on attempted second degree murder." *Hunt v. State*, No. 88,732 (Kan. Ct. App., October 10, 2003) (Unpublished Opinion). Given the abundance of evidence to support premeditation, petitioner was not prejudiced by counsel's failure to raise this claim on appeal.

C. Petitioner not denied Due Process by state court interpretation of state law.

Petitioner argues that on his direct appeal the KSC applied an *ex post facto* law which added objective elements to the imperfect self-defense under the voluntary manslaughter statute thereby denying him a defense in violation of due process. Because petitioner has met the exhaustion requirement, this Court must determine if the state court heard petitioner's claim on the merits or dismissed it on procedural grounds. *See Dever*, 36 F.3d at 1534 (The exhaustion requirement is satisfied if the highest court exercises discretion not to review the case.); *Leroy v. Marshall*, 757 F.2d 94, 97 (6th Cir. 1985). This determination can be difficult when the state court does not elaborate its reasons for denying review. That is the situation presented before this Court as the KSC's decision states only "Considered by the Court

and Denied".

Respondents argue that the KSC's rejection was based on a procedural bar because petitioner failed to assert this claim to the lower courts. *See State v. Shears,* 260 Kan. 823, 837 (1996) (a point not raised in the trial court cannot be raised for the first time on appeal); *Cf. Mercadel v. Cain*, 179 F.3d 271, 274-275 (5th Cir. 1999) (Construing a one-word denial of post-conviction relief claim as procedural rather than "on the merits" for purposes of § 2254(d) because the state court record showed that petitioner had committed a fatal procedural error).

There is also evidence to the contrary that this holding was on the merits. Petitioner raised this argument in a motion for rehearing immediately after direct review by the KSC; therefore, even had petitioner raised this issue to lower courts on collateral review, they would have been bound by res judicata. *See State v. Neer,* 247 Kan. 137, 140 (1990) ("Where an appeal is taken from the sentence imposed and/or a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised..."). Additionally, the justification for the state procedural bar is to give the trial court an opportunity to correct its own errors. *State v. Boyd*, 257 Kan. 82, 89 (1995). That justification is absent in this case as petitioner complains of an error in interpretation by the KSC not a trial court error. Finally, the lack of explanation for the decision is not determinative as brief summary dismissals can be dismissals on the merits. *See Aycox v. Little*, 196 F.3d 1174, 1177 (1999). The Supreme Court gave guidance to courts about how to determine if an unexplained order denying review is on the merits or upholding a procedural bar when it stated,

> [w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion 'fairly appear[s] to rest primarily upon federal law,'

> Coleman at 740, we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard the bar and consider the merits. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

This case presents a situation where there is no well reasoned opinion to interpret. Petitioner's claim was raised twice and only to the KSC which denied review each time with no explanation. This Court does not need to decide whether the state denial was based on procedural grounds or on the merits because the result is the same regardless.

C(1) Result under Procedural Bar

This Court may not review a claim if the decision by the state court rests on a state law ground that is independent of the federal question and adequate to support it. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "This rule applies whether the state law ground is substantive or procedural." *Id.* "A state procedural ground is independent if it relies on state law rather than federal law and is adequate if it is regularly followed and applied evenhandedly to all similar claims." *Zimmer v. McKune*, 87 F. Supp. 2d 1153, 1158 (D. Kan. 2000) quoting *Hickman v. Spears*, 160 F.3d 1269, 1271 (10th Cir. 1998).

The appellate practice of barring claims not raised at the trial level is a matter of state jurisprudence. Because it relies on state law rather than federal law, it satisfies the independent prong of the test. With respect to the adequacy prong, most procedural bar issues in Kansas center around objections not made at trial being barred for review at higher courts. *See Mize v. State*, 199 Kan. 666, 667 (1967) (Procedural bar necessary to allow a trial court to be permitted to correct its own errors). This rule has been applied

evenhandedly and followed regularly. *See State v. Heck*, 8 Kan. App. 2d 496, 502 (1983); *State v. Carr*, 265 Kan. 608, 620 (1998); *Hunt v. Lee*, 19 F. Supp. 2d 1212, 1215 (1998). There is little case law regarding a KSC error on direct review being barred by the KSC on collateral appeal because it was not raised to the lower courts on collateral review. The rationale behind the rule requiring objections to be made at trial court is inapplicable to petitioner's complaint; therefore, a rule establishing a procedural bar would be new and inadequate. *See Anderson v. AG*, 342 F.3d 1140, 1143 (10th Cir. 2003)("To be adequate, 'a state's procedural rule used to bar consideration of a claim must have been firmly established and regularly followed by the time as of which it is to be applied.'" quoting *Walker v. Attorney General*, 167 F.3d 1339, 1344 (10th Cir. 1999)). This Court will assume *arguendo* that there is no adequate basis for the state's procedural bar and review petitioner's claim on the merits.

Petitioner argues that the KSC's interpretation of *Ordway* was an unforeseeable change to the imperfect self-defense elements under the voluntary manslaughter statute which is an *ex post facto* law that violated his due process rights. "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, can function like an *ex post facto* law, and violate Due Process Clause." *United States v. Capps*, 77 F.3d 350, 354 (10th Cir. 1996). The Supreme Court has stated that depriving one of any defense available according to the law at the time the crime was committed is prohibited as *ex post facto*. *Collins v. Youngblood*, 497 U.S. 37, 42 (1990); *Beazell v. Ohio* 269 U.S. 167, 169-170 (1925).

Ordway is the leading case in Kansas regarding the imperfect self defense prong of the voluntary manslaughter statute. *State v. Ordway*, 261 Kan. 776 (1997); See K.S.A. 21-3403(b). It requires only a subjective inquiry if the defendant had an honest but unreasonable belief that circumstances existed that justified deadly force. *Ordway*, 261 Kan. at 787. Ordway specifically states that objective factors are

not to be considered. *Id*. This view is supported by legislative history. *Id*. at 787-788. The question turns on whether or not the KSC overruled *Ordway* to include such objective elements like aggressor, imminence and unlawful force, which according to petitioner would be an unconstitutional application of an *ex post facto* law.

This Court holds that the KSC did not overrule *Ordway*. First, the KSC opinion in petitioner's direct appeal does not even mention *Ordway* nor are the words objective or subjective stated in the opinion. *State v. Hunt*, 270 Kan. 203 (2003). It is difficult to imagine overruling the leading case by adding objective elements without specifically stating these words. Second, the legislative history shows that Kansas intended to make imperfect self-defense a subjective only inquiry and there is no discussion in the KSC opinion about contravening legislative intent. *Id*. Third, on collateral review, the KCA cited *Ordway* as good law, requiring only subjective elements and denying petitioner's claim for an attempted voluntary manslaughter instruction. *Hunt v. State*, No. 88,732 (Kan. Ct. App., October 10, 2003) (Unpublished Opinion). Therefore, by denying review on collateral appeal, the KSC was also confirming the lower court's interpretation of *Ordway* as good law. *See Ylst v. Nunnemaker*, 501 U.S. at 803. Because the KSC did not overrule *Ordway*, it did not deny petitioner a defense previously available to him; therefore, it did not violate defendant's due process rights by applying an *ex post facto* law.

C(2). Result under State Ruling on the Merits

Assuming the KSC's decision was on the merits, this court will evaluate petitioner's claim to see if the result was contrary to or involved an unreasonable application of clearly established Federal law as established by the Supreme Court. See § 2254(d)(1).

As discussed above, the KSC decision did not implicate *ex post facto* or due process issues because the KSC did not change the law but merely read petitioner's facts as not meeting the legal requirements for imperfect self-defense. The KSC holding was an interpretation of the state voluntary manslaughter statute and this Court will not review decisions by a state court regarding application of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Petitioner does not argue that the state decision was an unreasonable determination of the facts in light of the evidence presented; therefore, this Court does not consider that issue.

D. Petitioner's Right to Trial by Jury.

Petitioner claims that the trial court's refusal to issue a voluntary manslaughter instruction violated his constitutional right to a trial by a jury. The record shows that this claim was not presented to any of the Kansas state courts; therefore, this claim is procedurally barred because petitioner has not exhausted his state remedies. *See Dever*, 36 F.3d at 1534. This Court can either dismiss as to allow the petitioner to refile in state court or review and deny on the merits. *See Rose*, 455 U.S. at 510; *Brown*, 185 F.3d at 1125; § 2254(b)(2).

According to K.S.A. § 60-1507(f)(1), petitioner can bring an action for collateral relief within a year of the final order of the last appellate court or the denial of a petition for writ of certiorari to the U.S. Supreme Court. Petitioner's convictions were affirmed by the KSC on December 8th, 2000 and there is nothing in the record to show he appealed to the U.S. Supreme Court. While there is an exception in K.S.A. § 60-1507(f)(2) which allows the time limitation to be extended to prevent manifest injustice, there is little Kansas law on this subject. The KSC has stated that "K.S.A. 60-1507 follows the language of a

federal statute, see 28 U.S.C. § 2255(1994), and the body of law developed thereunder should be given great weight in construing K.S.A. 60-1507." *Easterwood v. State,* 273 Kan. 361, 371 (2002). If a claim is time barred under § 2255, a petitioner must show extraordinary circumstances to qualify for equitable tolling of the one-year statute of limitation. *United States v. Willis*, 202 F.3d 1279, 1281 (10th Cir. 2000); See also *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (extraordinary circumstances present when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by circumstances beyond his control).

Petitioner has not elucidated any reasons for his delay; accordingly, this Court will assume *arguendo* that because petitioner's claim would fail this Circuit's exception to the statute of limitations that this case would not qualify for the Kansas exception either. Therefore, if this Court dismissed for refiling at the state level, petitioner would be unable to raise this claim because it would be time barred. *Donaghey,* 173 F. Supp. 2d at 1152; *Coleman,* 501 U.S. at 735 n.1.

When a state procedural bar is an issue, this court must evaluate the state grounds for the bar to see if it is both independent and adequate. "A state procedural ground is independent if it relies on state law rather than federal law and is adequate if it is regularly followed and applied evenhandedly to all similar claims." *Hickman*, 160 F.3d at 1271.

The statute of limitations relies entirely upon state law; therefore, it is an independent ground. Likewise Kansas has consistently barred petitions that have been filed after the statute of limitations. *See State v. Thomas,* 21 Kan. App. 2d 504, 506 (1995); *State v. Medina,* 256 Kan. 695, 700 (1994); *State v. Ji,* 255 Kan. 101, 103 (1994) ("It is the established rule in this state that this court has no jurisdiction to entertain an appeal by a defendant in a criminal case unless the defendant appeals within the time

prescribed by the statutes providing for such an appeal"). The statute of limitations barring petitioner's claim is based on adequate state grounds.

When a claim is procedurally barred at the state level, it is procedurally defaulted in this Court as well. *Donaghey*, 173 F. Supp. 2d at 1152; *Coleman*, 501 U.S. at 735 n.1. For the Court to consider the merits of a procedurally defaulted claim, petitioner must show both cause for the default and prejudice ensuing therefrom or a miscarriage of justice. *Murray v. Carrier*, 477 U.S. 478, 488-489, 496 (1986).

"To show cause, petitioner would have to demonstrate 'that some objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule.'" *Ballinger v. Kerby*, 3 F.3d 1371, 1375 (10th Cir. 1995) quoting *Murray*, 477 U.S. at 488. Petitioner offers no explanation for why he failed to raise this issue and exhaust his state court remedies. Because petitioner fails to show cause for his procedural default, it is unnecessary to evaluate the prejudice part of the test.

Petitioner cannot show that there was a fundamental miscarriage of justice either. A fundamental miscarriage of justice requires a showing of actual innocence. *Brecheen v. Reynolds*, 41 F.3d 1343, 1356-1357 (1994). Petitioner cannot meet this standard as he has admitted the actions for which he was convicted. Therefore, petitioner's claim is procedurally defaulted.

E. Cumulative Errors

Petitioner claims that his counsel's cumulative errors along with the suppression of exculpatory evidence denied him his right to a fair trial. The KCA denied petitioner's claim stating, "Hunt states no errors that have not been discussed herein, and there is no error sufficient to deny Hunt a fair trial." *Hunt v. State*, No. 88,732 (Kan. Ct. App., October 10, 2003) (Unpublished Opinion). The KCA evaluated

petitioner's claim using state law. *State v. Struzik,* 269 Kan. 95 , 113 (2000) (Weight of cumulative trial errors may well be so great as to require the reversal of defendant's conviction).

The Supreme Court has stated that habeas relief can be justified if the cumulative effect of alleged errors infect the trial to an extent that it violates a defendant's due process rights. *Rose* 455 U.S. at 531. The KCA held that petitioner did not show any constitutional error; therefore, using a cumulative error analysis, his rights to a fair trial and due process were not violated. *See United States v. Caballero,* 277 F.3d 1235, 1250 (10th Cir. 2002).("Cumulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."quoting *United States v. Rivera,* 900 F.2d 1462, 1471 (10th Cir. 1990)). The KCA decision was not an unreasonable application of federal law as petitioner has failed to show any error that would deny him a right to a fair trial or due process.

IT IS THEREFORE ORDERED that the petition for relief under 28 U.S.C. § 2254 (Doc. 1) is DENIED;

IT IS FURTHER ORDERED that a Certificate of Appealability under 28 U.S.C. § 2253 is DENIED.

SO ORDERED this 26th day of October, 2004.

s/ Wesley E. Brown
Wesley E. Brown, Senior U.S. District Judge